No. 18-302

IN THE

Supreme Court of the United States

ANDREI IANCU, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE,
PETITIONER,

V.

ERIK BRUNETTI
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE CATO INSTITUTE, DKT LIBERTY PROJECT, AMERICANS FOR PROSPERITY, P.J. O'ROURKE, AND NADINE STROSSEN AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Does the government get to decide what language is "scandalous"?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. "VULGAR" LANGUAGE PLAYS AN IMPORTANT ROLE IN SOCIETY 7

A. Vulgar Language Is Necessary for Full and Authentic Expression 7

B. Distaste for "Vulgar" Language Often Arises from Prejudice 14

C. Profane Language Is Beneficial for Science and Health 17

II. THE GOVERNMENT CANNOT OBJECTIVELY DETERMINE WHAT LANGUAGE IS "SCANDALOUS" 22

A. There Can Be No Single Standard for Offensiveness in a Pluralistic Society 22

B. The Lines Censors Draw Are Often Biased, Irrational, or Naïve 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

Matal v. Tam, 137 S. Ct. 1744 (2017) 3, 4

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United States v. One Book Called "Ulysses", 5 F. Supp. 182 (S.D.N.Y. 1933) 10

Statutes

15 U.S.C. § 1052(a) 4

Higher Authority

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This Film Is Not Yet Rated (IFC Films 2006) 26

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INTEREST OF *AMICI CURIAE*[1]

The **Cato Institute** is a nonpartisan think tank dedicated to individual liberty, free markets, and limited government. Its Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The **DKT Liberty Project** promotes liberty against government encroachment. DKT is committed to defending privacy, guarding against government overreach, and protecting every American's right and responsibility to function as an autonomous and independent individual. It espouses vigilance over regulation of all kinds, but especially those that restrict civil liberties. DKT has filed briefs as *amicus curiae* in this Court and the lower courts on issues involving constitutional rights and liberties, including the First Amendment, freedom from unreasonable searches and seizures, and the right to own and enjoy property.

Americans for Prosperity recruits, educates, and mobilizes citizens to build a culture of mutual benefit where people succeed by helping others improve their lives. AFP advocates policies that promote that culture, including free speech, criminal justice reform, and limited government. Vague laws governing expression are particularly antithetical to a culture of mutual benefit because they restrict expression while undermining the rule of law and expanding government power over the lives of private citizens.

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[1] Rule 37 statement: Both parties were notified of and consented to the filing of this brief. No party's counsel authored any of this brief; *amici* alone funded its preparation and submission.

P.J. O'Rourke is one of America's leading political satirists, an H.L. Mencken Research Fellow at the Cato Institute, and an equal-opportunity offender. Formerly the editor of the *National Lampoon*, he has written for such scandalous publications as *Car and Driver, Playboy, Esquire, Vanity Fair, House & Garden, The New Republic, New York Times Book Review, Parade, Harper's,* and *Rolling Stone.* He is currently editor-in-chief of the web magazine *American Consequences.* O'Rourke's books have been translated into a dozen languages and are worldwide bestsellers. Three have been *New York Times* bestsellers: *Parliament of Whores, Give War a Chance,* and *All the Trouble in the World.* He is also the author of *Eat the Rich, Peace Kills,* and *Don't Vote: It Just Encourages the Bastards.*

Nadine Strossen holds the John Marshall Harlan II Chair at New York Law School, was president of the ACLU from 1991 through 2008, and continues to serve on the ACLU's National Advisory Council. She also holds leadership positions in other organizations that focus on free speech issues, including the Foundation for Individual Rights in Education (FIRE). Strossen's writings defending the freedom for offensive expression include *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (1995) and *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* (1994). Her latest book is *HATE: Why We Should Resist It with Free Speech, Not Censorship* (2018). Her ideas on these topics have many times been deemed sufficiently scandalous to trigger boycotts, dis-invitations, and picketing, as well as death threats. To cite one memorable example, on April 12, 2005, while attempting to speak at an event honoring Justice Scalia, she was shouted down by protestors who were offended by some of his opinions and

her participation in the event.[2] Ironically, some of these protesters engaged in offensive expression themselves, without Justice Scalia or anyone else trying to suppress it. Strossen is proud to occupy a chair named after the justice who authored *Cohen v. California*, which upheld the right to engage in offensive and even vulgar expression, recognizing that this is "powerful medicine in a society as diverse . . . as ours" but explaining that "no other approach would comport with the premise of individual dignity and choice upon which our political system rests."

Amici are committed to preserving free expression and pushing people out of their comfort zones. We all say things that some people find scandalous—but it's not the government's role to make that judgment. *Amici* have previously filed briefs in this Court in many other First Amendment cases dealing with the freedom of speech, including *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015); and *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014).

INTRODUCTION AND SUMMARY OF ARGUMENT

Here we go again. Just two years ago, the Court unanimously told the Patent and Trademark Office (PTO) that it can't punish trademarks just because some people find them "disparaging." *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017). Not having learned its lesson, the PTO now insists it can punish trademarks just because some people find them "scandalous."

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[2] *See, e.g.*, Petrox, *Scalia at NYU Law: When Libs and Free Speech Implode*, DailyKos, Apr. 12, 2005, https://bit.ly/2OlyeNg.

The PTO denied federal trademark registration for a clothing brand called "fuct," because that name sounds like a naughty word. *See* Pet. App. 1a. That verbal association ran afoul of a Lanham Act provision that bars federal registration for any mark that "[c]onsists of or comprises immoral . . . or scandalous matter." 15 U.S.C. § 1052(a). In practice, the provision is used to deny registration to marks that PTO examiners consider to be "vulgar." *See* Pet. App. 3a.

Denying federal trademark registration has real negative consequences. "Federal registration . . . confers important legal rights and benefits on trademark owners who register their marks." *Tam*, 137 S. Ct. at 1753 (cleaned up, but not in the sense of removing "bad" words). By the government's own admission, denying registration to "scandalous" marks "creates a practical disincentive to their use by rendering certain government benefits unavailable." Pet. Br. 33.

But the government argues that this disincentive should not be treated as a ban. Pet. Br. 40–41. This should come as some surprise to this Court, given that the Disparagement Clause, which provided exactly the same disincentive, was struck down for "offend[ing] a bedrock First Amendment principle: Speech may not be *banned* on the ground that it expresses ideas that offend." *Tam*, 137 S. Ct. at 1751 (emphasis added).

The Scandalous Marks Clause violates the First Amendment in the same way that the Disparagement Clause did. As the Court explained in *Tam*, "powerful messages can sometimes be conveyed in just a few words." *Id.* at 1760. By denying trademarks to words deemed "scandalous," the government is dictating permissible and impermissible vocabulary. And when our

freedom to articulate our ideas is curtailed, our freedom to express those ideas is also curtailed:

> Just as a healthy brain needs both its 'higher' and 'lower' parts, cerebral cortex and limbic systems, a healthy society needs its 'good' language and its 'bad.' We need irreproachably formal and unassailably decent speech, but we also need the dirty, the vulgar, the wonderful obscenities and oaths that can do for us what no other words can.

Melissa Mohr, *Holy Sh*t: A Brief History of Swearing* 15 (2013).

None of the supposed interests raised by the government can justify this abridgment of vocabulary. This case is not about where "vulgar" words will or won't appear in public places like billboards or broadcasts. A trademark does not grant universal advertising rights that supersede local sign codes or FCC regulations. The debate over the extent to which a government can limit words appearing in view of children can be left for a later day (and such regulations are likely better handled at the community level anyway).

Instead, this case is about whether brands can be punished *nationwide*, regardless of where they advertise and whom they choose to target for business, just because the government finds their name distasteful. Moral panic over "vulgar" language is nothing new. "In the Middle Ages, blasphemous oaths were used so frequently that authorities worried they might injure God himself, and religious writers pleaded, then threatened, in order to get people to stop swearing." *Id.* at 15. But its lengthy historical pedigree does not make the goal any more legitimate.

In 1971, attorney Mel Nimmer argued before this Court in defense of the right to wear a jacket reading "Fuck the draft." While preparing for his appearance, Nimmer "was convinced that he had to use that word, and not some euphemism, in his oral argument to make his point that its use could not be banned from all public discussion." William S. Cohen, *Looking Back at* Cohen v. California, 34 U.C.L.A. L. Rev. 1595, 1599 (1987). Lo and behold, Nimmer got away with saying the forbidden word in his very first answer, and the foundations of the building did not crack.

This brief is submitted in the spirit of Nimmer, and with the same intent. Although the words we use are unusual for a Supreme Court brief, here they are necessary. Just because a brand like Fuct might not fit the PTO dress code doesn't mean it has no place in American culture. The PTO's efforts to discourage profanity in American life are profoundly misguided.

> When used judiciously, swearing can be hilarious, poignant, and uncannily descriptive. . . . It engages the full expanse of the brain: left and right, high and low, ancient and modern. Shakespeare, no stranger to earthy imprecations himself, had Caliban speak for the entire human race when he said, "You taught me language, and my profit on't is, I know how to curse."

Steven Pinker, *The Stuff of Thought: Language as a Window into Human Nature* 372 (2007).

For these reasons, and those explained by the respondents, the Court should affirm the Federal Circuit, striking down the "scandalous marks" provision.

ARGUMENT

I. "VULGAR" LANGUAGE PLAYS AN IMPORTANT ROLE IN SOCIETY

A. Vulgar Language Is Necessary for Full and Authentic Expression

"In 1973, Yugoslav philologist Olga Penavin predicted that swearing would simply go extinct with the spread of socialism. In a socialist utopia, there would be no conflict, and thus no need for swearwords, she reasoned." Mohr, *supra*, at 254. Sadly for Dr. Penavin, however, the oft-predicted triumph of socialism is still running behind schedule. Society remains firmly fixed in the real world, a world in which conflict, passion, and high emotions are an inherent part of life. And so long as such a world exists, it will remain impossible to fully convey the full range of our thoughts and feelings without a vocabulary that includes swearing.

The government argues that eliminating "vulgar" words from speakers' vocabularies does nothing to hamper their ability to express any and all ideas. In that telling, "scandalous marks are ineligible for registration not because they are thought to convey offensive *ideas*, but because such marks reflect an offensive *mode* of expressing *whatever* idea the speaker wishes to convey." Pet. Br. 20. (cleaned up, so to speak).

This is akin to arguing that the government could ban most words of Latinate origin (such as *encounter*, *putrefy*, and *educate*) without any harm to expression, since those words each have Germanic equivalents (such as *meet*, *rot*, and *teach*). Such a ban would *obviously* hinder expression. As any author knows—and even many lawyers sense—expressing an idea well requires finding just the right word, and writing with a

truncated vocabulary is like conducting an orchestra with one hand tied behind your back.

The nomenclature that the PTO considers scandalous is no different. As Steven Pinker points out, a sentence like, "Will you pick up your dog's shit, and stop him from pissing on my roses!" would not mean the same thing if the profanity were replaced by politesse. In a sanitized version of the same sentence, "the emotional force of the speaker's reaction is no longer being conveyed." Pinker, *supra*, at 352. A rose by another name may smell as sweet—and dog "poop" still doesn't—but without the same visceral effect.

Artists and authors know the power of profanity. Take just one example. In a climactic scene of the film adaptation of Isaac Bashevis Singer's *Enemies: A Love Story*, a wife confronts the husband who betrayed her after she had hidden him from the Nazis:

> Fighting back tears of rage, she looks him in the eye and says slowly, "I saved your life. I took the last bite of food out of my mouth and gave it to you in the hayloft. I carried out your *shit*!" No other word could convey the depth of her fury at his ingratitude.

Pinker, *supra*, at 371.

The PTO's misguided belief that strong language can be replaced by euphemisms with no harm to expression is nothing new. In 1818, Englishman Thomas Bowdler took it upon himself to "improve" the language of Shakespeare by removing all the fun parts. As Bowdler explained in his preface, "[m]any words and expressions occur which are of so indecent a nature as to render it highly desirable that they should be erased . . . neither the vicious tastes of the age, nor

the most brilliant effusions of wit, can afford an excuse for profaneness or obscenity." Thomas Bowdler, *The Family Shakespeare* vii (1863). In 1833, American Noah Webster did the same to the Holy Bible, inserting "euphemisms, words and phrases which are not very offensive to delicacy." *See* Mohr, *supra*, at 195.

If this type of "cleaning up"[3] truly has no effect on the expression of ideas, then we should expect classic works to come out the other side of a Bowdlerist scrubbing none the worse for wear. But of course, any comparison shows that is not the case. Bowdlerization frequently dulls and waters down otherwise vivid language, making passages less poetic—and less faithful to the ideas the author wanted to convey. *Compare* 1 Kings 14:10 King James Version ("Therefore, behold, I will bring evil upon the house of Jeroboam, and will cut off from Jeroboam him that pisseth against the wall") *with* 1 Kings 14:10 New American Standard Bible ("therefore behold, I am bringing calamity on the house of Jeroboam, and will cut off from Jeroboam every male person") (discussed in Mohr, *supra*, at 81–82); *compare* "Out, damned spot!" *with* "Out, crimson spot!", Ross E. Davies, *How Not to Bowdlerize*, The Green Bag Almanac and Reader 235 (2009); *compare* "the bawdy hand of the dial is now upon the prick of noon" *with* "the hand of the dial is now upon the point of noon," Bowdler, *supra*, at 827. And inevitably, even those projects that begin by insisting they will target only offensive *words* will soon find that there are some *ideas* that cannot be expressed in an inoffensive way. Is there any polite way to say that a woman committed suicide? Of course not, so Bowdler's Ophelia drowns in

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[3] Not to be confused with "(cleaned up)." *See* Metzler, *Cleaning Up Quotations*, 18 J. of App. Practice & Process 143 (2017).

an unfortunate accident. *See* Simon Thomas, *What Did Bowdler Bowdlerize*, OxfordWord Blog (July 11, 2016), https://bit.ly/2JAqh84.

Besides being necessary for expressing emotional heights, scandalous words are indispensable when authors capture how real people converse. Writers often employ vulgar language to achieve a verisimilitude that would otherwise be impossible. When James Joyce first published *Ulysses* in 1922, the book came under fire for its frequent use of profanity. But in an opinion upholding the artistic merit of the book and allowing it to be published in this country, Judge John Woolsey explained, "The words which are criticized as dirty are old saxon words, known to almost all men and, I venture, to many women, and are such words as would be naturally and habitually used, I believe, by the types of folk whose life, physical and mental, Joyce is seeking to describe." *U.S. v. One Book Called "Ulysses"*, 5 F. Supp. 182, 183–84 (S.D.N.Y. 1933).

The fact is, if an author wants to write the way people talk, that author is going to have to include profanity. The average contemporary English speaker uses 80 to 90 swear words per day. Timothy Jay, *The Utility and Ubiquity of Taboo Words*, 4 Perspectives on Psychological Science, No. 2, 155 (2009).[4] One study found that across three different social settings, only four types of words were consistently used with the highest

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[4] This figure is even more impressive if we assume that those who work at the PTO are as sensitive as the government claims. *See* Pet. App. 33a ("At another point, the government indicated its interest is to shield its examiners from immoral or scandalous marks."). Since none of these examiners could possibly have the urge to sully their own lips, there must be some people out there swearing 180 times a day to make up the difference.

frequency: pronouns, articles, prepositions, and profanity. Mohr, *supra*, at 251.

Of course, curse words are not as routine as prepositions or pronouns, even if they are nearly as common. "Curse words are words we are not supposed to say; hence, curse words themselves are powerful." Timothy Jay, *Why We Curse: A Neuro-Psycho-Social Theory of Speech* 18 (1999) [hereinafter Jay, *Why We Curse*]. For this reason, their use can serve as a signal of trust and familiarity that no euphemism could achieve.

In his autobiographical novel *The Water Is Wide* (1972), author Pat Conroy recounts his experience as a white teacher at an all-black school in the deep south of the 1960s. As the book shows, "Conroy had to establish trust where there was none, and profanity helped him do it." Michael Adams, *In Praise of Profanity* 74 (2016). Conroy discovered that profanity, even the mild-but-shocking-to-schoolchildren "bullcrap," is a signal of authenticity. In everyday life, profanity is "an accident of just talking. Break down social barriers, attempt to build new relationships, and people talk the way they talk, neglecting self-censorship." *Id.* at 75.

Profanity is thus a powerful rhetorical device. By establishing a less formal connection with a listener, it can make an orator or author seem both more trustworthy and more persuasive. *See* Eric Rassin & Simone van der Heijden, *Appearing Credible? Swearing Helps!*, 11 Psychology, Crime & Law No. 2, 177 (2005) (finding that testimony containing words such as "God damn it," "shitty," "fucking," and "asshole" was perceived as more credible than otherwise identical testimony without swears); Cory Scherer & Brad Sagarin, *Indecent Influence: The Positive Effects of Obscenity on Persuasion*, 1 Social Influence 138 (2006).

The same principles hold true for titles of artistic works, which serve as a form of advertising and brand identity for artists and authors:

> In March 2011, three of the top-ten hit songs on the *Billboard* pop music chart had obscenities in their titles . . . . Cee Lo Green told various people off with 'Fuck You!,' Enrique Iglesias begged pardon for his rudeness in announcing 'Tonight (I'm Fucking You),' and Pink told listeners that they needn't be 'Fuckin' Perfect.'

Mohr, *supra*, at 246; *see also* Jon Pareles, *From Cee Lo Green to Pink, Speaking the Unspeakable*, N.Y. Times, Mar. 15, 2011 (noting the effectiveness of the taboo chorus in a market where "[p]op songs fight to be noticed in an arms race of sentiments, gimmicks, sonic manipulation and promotional strategies"). And such edgy strategies are not limited to hip-hop. In fact, "*New York Times* best-selling books have been ahead of the curve in this respect." Mohr, *supra*, at 247. Perusing the historical list of titles that made this list, one would find "Randall Kennedy's *Nigger* way back in 2003, followed by Harry Frankfurt's *On Bullshit* (2005), Justin Halpern's *Shit My Dad Says* (2009), and Adam Mansbach's *Go the Fuck to Sleep* (2011)." *Id.*[5]

And this brings us, finally, to brands themselves. The government attempts to distinguish brand names

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[5] Counsel of record is the father of two young boys and owns *Go the Fuck to Sleep*. He can attest to the profound truth of parenting conveyed by the narrator's profane imploring, which captures a state of mind every new parent experiences:

> The flowers doze low in the meadows
> And high on the mountains so steep.
> My life is a failure, I'm a shitty-ass parent.
> Stop fucking with me, please, and sleep.

from longer artistic works by arguing that trademarks are "simply source identifiers." Pet. Br. 44. But even the shortest brand name can pack an expressive punch and define an identity. When a clothing brand chooses a name like "FCUK," for example, this choice embraces "the risqué element, the apparent avoidance through mis-ordering, the in-your-face-ness of *fuck*, which they appear to sidestep but in fact highlight." Ruth Wajnryb, *Expletive Deleted: A Good Look at Bad Language* 187 (2005). In this way, "both profanity and its euphemisms help to manufacture the brand community." Adams, *supra*, at 71. Though it's certainly not what every brand wants, edgy and even vulgar language can perform an important signaling role.

Of course, all of these examples are not to suggest that that *every* use of profanity comes from a place of authenticity. Like any rhetorical device, profanity can be manipulated, with varying degrees of success.[6] Nor is profanity something that every speaker wants to be associated with. The point is that whether to use profanity is a *choice*—a meaningful choice—that changes not just the *mode* of expressing ideas but the *attitude* and *meaning* of the ideas themselves. As the psychologist Timothy Jay explains:

> How we use these curse words portrays our deep emotional investment in a personal identity which we use to experience the world, to differentiate ourselves from others, and to express our feelings and attitudes about others. The use

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[6] Like other rhetorical devices, profanity can be transparently put on as an affectation. When done clumsily, the effect is far less powerful—and more cringe-inducing. *See, e.g.*, Dan Merica, *Sh*t Talking Is Democrats' New Strategy*, CNN.com (April 24, 2017), https://cnn.it/2FlCCb5.

> of these words tells us who we are and how we fit in the world. We do not just utter curse words; curse words are part of our identities.

Jay, *Why We Curse* 82.

The choice of how we use these words, like all other expressive choices, is one that the First Amendment allows us to make without punishment.

B. Distaste for "Vulgar" Language Often Arises from Prejudice

Not only does punishing profanity harm expression, it also carries unjustified value judgments about class and culture. "*Vulgar* language makes a class distinction—it is that spoken by ordinary, uneducated folk. It has become a synonym for swearing because 'the common people' have through the centuries been thought to be more likely than others to employ profane or obscene language." Mohr, *supra*, at 11.

Much of the distaste for obscenity comes from a notion that peppering speech with colorful words belies a lack of education, a small vocabulary, or both. One 1890s English slang dictionary derisively defined "bloody" this way:

> [A]s it falls with wearisome reiteration every two or three seconds from the mouths of London roughs of the lowest type, no special meaning, much less a sanguinary one, can be attached to its use. In such a case it forms a convenient intensitive, sufficiently important as regards sound to satisfy those whose lack of language causes them to fall back upon a frequent use of words of this type.

"Bloody," *Slang and Its Analogues*, (Farmer & Henley, eds., 1890). The 1888 Oxford English Dictionary similarly editorialized that "bloody" was a word "constantly in the mouths of the lowest classes, but by respectable people considered a 'horrid' word." *See* Mohr, *supra*, at 212.

This conflation of swearing with mental laziness or ignorance has continued to the present. In the anti-swearing book *Cuss Control*, the author writes that:

> [T]he S word and several other obscenities have many applications. When we get mentally and verbally lazy, these words are always on call, sparing us the task of scanning our brain and downloading even the most simple noun or adjective. There seems to be no need to make the effort when talking intelligently is rarely a social requirement, and curse words are as common as bad grammar.

James V. O'Connor, *Cuss Control: The Complete Book on How to Curb Your Cursing* 18 (2000).

It is ironic that words which can be so versatile, with an entire encyclopedia devoted to the meanings of just the word "fuck," can be derided as used only by those with deficient vocabularies. *See generally* Jesse Sheidlower, *The F-Word* (2009). Indeed, "fuck," is so versatile and expressive a word that an entire scene of a prestige television drama was written with dialogue containing nothing but variations of it. *See* The Wire, *Old Cases* (HBO 2002); *see also* Jonathan Abrams, *An Oral History of* The Wire*'s Unforgettable 5-Minute F*ck' Scene*, Vulture (Feb. 13, 2018), https://bit.ly/2Sph1Yq.

Scenes like that give the lie to the notion that profanity is purely the domain of those with small vocabularies. "When things are so grim . . . ordinary words fail even the most seasoned detectives. It's not that [the detective characters] don't know more words—there just isn't anything else to say but *fuck*, or *Aw, fuck*, or *motherfuck*." Adams, *supra*, at 134.

In sum, stereotypes about those who use profanity are just that: stereotypes. In fact, studies have shown that using profanity is *positively* correlated with both intellect and honesty. *See, e.g.*, Kristin L. Jay & Timothy B. Jay, *Taboo Word Fluency and Knowledge of Slurs and General Pejoratives: Deconstructing the Poverty-of-Vocabulary Myth*, 52 Language Sciences 251 (2015); Gilad Feldman, et al., *Frankly, We Do Give a Damn: The Relationship Between Profanity and Honesty*, 8 Social Psycological & Personality Science 816 (2017); *see also* Dave Maclean, *Intelligent People Are More Likely to Swear, Study Shows*, The Independent, (Aug. 28, 2017), https://ind.pn/2jzdi6Y.

If there is an element of truth to the identification of obscenity with lower classes, it arises not from a lack of education but instead from the fact that obscenity in literature and music are the most effective words "for resisting 'the system' and the dominant culture that expects certain kinds of 'good' language and behavior." Mohr, *supra*, at 248. As the linguist Tony McEnery argued, "[b]roadly speaking, the discourse of power excludes bad language, the discourse of the disempowered includes it." Tony McEnery, *Swearing in English: Bad Language, Purity and Power from 1586 to the Present* 10 (2006). Or as Lenny Bruce put it even more pointedly: "If you can't say 'fuck,' you can't say 'fuck the government.'" *See Fuck* (ThinkFilm 2005).

If indeed profanity is used to a greater extent by the disempowered, this only further establishes that a ban aimed solely at profanity can never be truly "viewpoint neutral." The history of prejudicial attitudes behind anti-profanity campaigns is yet another reason to reject the idea that punishing profanity can ever serve a legitimate government interest.

C. Profane Language Is Beneficial for Science and Health

Discouraging profanity not only fails to further a legitimate interest, it also affirmatively *harms* the progress of science by placing an unnecessary taboo on a rich area of research. Put simply "we learn things about language, the mind, the brain, and society from profanity that we simply couldn't know if we pointed our microscopes elsewhere." Benjamin K. Bergen, *What the F: What Swearing Reveals About Our Language, Our Brains, and Ourselves* 223 (2016).

First, swear words have helped us to better understand our own brains and how we process language. Scientists have observed that patients with damage to the left hemisphere of their brain can lose "the ability to construct syntactically correct sentences[], while retaining the ability to curse." Jay, *Why We Curse* 33.

Why would this be? Language is typically said to originate from the brain's left hemisphere, which is associated with "calculation, analytic thinking, and verbal reasoning." *Id.* at 35. An expletive, however, is one of the few pieces of language that contains its whole meaning in a single word, without needing to be combined with others in a complex syntax. A dirty joke or pun, on the other hand—much as we like "dad jokes"—

requires syntax. The left-hemisphere-damaged patients could achieve the former, but not the latter. Thus, these studies of swearers led researchers to realize that *holistic* speech—singular words and phrases that contain a set meaning and pack an emotional punch—actually comes from the right hemisphere, which also controls "visualization, musical abilities, spatial reasoning, and holistic processing." *Id.*[7] In this way, "understanding how and why we swear has helped us to reverse-engineer the structure of the brain." Emma Byrne, *Swearing Is Good for You: The Amazing Science of Bad Language* 29 (2018).

This phenomenon means that in some cases, curse words become the last link between loved ones and a friend or family member dealing with cognitive loss. One early researcher

> described patients who uttered 'god bless' when frustrated or 'damn' when a family member did not arrive at the hospital on time. However, the patient could not construct sentences with curse words on demand. While a brain-damaged patient cannot construct sentences, he or she can utter meaningful emotional statements learned in childhood. Hence, curse words remain accessible as implicit knowledge when other avenues for communication become unavailable.

Jay, *Why We Curse* 87.

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[7] This understanding of the brain is supported by the case of a man with damage to his *right* hemisphere. After his injury he could still speak in fluent sentences, but "he was unable to sing familiar songs or recite nursery rhymes, and he couldn't spontaneously swear." Bergen, *supra*, at 90. In other words, he had been rendered into the model PTO employee.

Placing a taboo on curse words, reinforced by government policies establishing those words as undesired, only adds unneeded harm and embarrassment for patients and families in this situation. When Charles Baudelaire was hospitalized after a stroke in 1866, for example, he barely spoke except to utter the phrase "cré nom," short for "sacré nom de Dieu." He repeated this phrase so often that the nuns who served as his caretakers threw him out of the hospital, "so unforgivably offended . . . that they could explain Baudelaire's outbursts only as the result of satanic possession." Mohr, *supra*, at 3.

In addition to neuroscientists, linguists have also long marveled at the unique properties of profanity. Swearwords are some of the most versatile words in any language. "Geoffrey Hughes categorizes swearing into eight classes, while Tony McEnery finds sixteen." Mohr, *supra*, at 214. Swear words are also grammatical wonders. English has prefixes and suffixes galore, but how many words can be placed in the *middle* of other words? "[O]nly profane words (or near facsimiles) can be 'infixed' into other words in English," in such classic examples "as the *fucking* in *un-fucking-believable*." Bergen, *supra*, at 6.

Further, swears are the only adjectives that can modify the mood of an *entire* sentence. Steven Pinker provides this example:

Interviewer:	Why is British food so bad?
John Cleese:	Because we had a bloody empire to run, you see?

Pinker, supra, at 361.

If "bloody" were a normal adjective, it would be modifying the noun "empire." Yet "Cleese was not casting aspersions on the empire on which the sun never set; he was expressing mock exasperation with the interviewer's question." *Id.* Expletives thus have the unique ability to break the fourth wall of the sentences that contain them. Like characters in a play choosing to talk about the play they are in rather than their fellow characters, "[e]xpletives indicate that something is lamentable about an entire state of affairs, not the entity named by the noun." *Id.*

Not only is swearing of interest to researchers, it has been shown to have practical benefits as a scientifically proven painkiller. *See* Richard Stephens, *et al., Swearing as a Response to Pain—Effect of Daily Swearing Frequency*, 12 J. of Pain, Issue 12, 1274 (2011) (finding that those who yelled swear words such as "fuck!" could endure submerging their hands in painfully cold water for 40 seconds longer, on average, than those who attempted to suffer with dignity). Instead of discouraging profanity, perhaps the government should instead be *promoting* it as the only proven painkiller with no risk of dangerous side-effects.

Finally, swearing is practically useful for the simple reason that it can serve as an emotional outlet for settling conflicts that might otherwise turn physical. "It has been said that he who was the first to abuse his fellow-man instead of knocking out his brains without a word, laid thereby the basis of civilization." John Hughlings Jackson, *Selected Writings of John Hughlings Jackson, Vol. 2* 179 (1958).

In early 16th Century Scotland, royals would pit poets against each other in comedic insult battles

called "flyting." "Flyting was very much like the freestyle battles of today, in which rappers compete to insult each other in the most creative ways." Mohr, *supra*, at 155. A few "flyting" lines have been preserved for posterity, including Walter Kennedy's dismissal of William Dunbar as a "Skaldit skaitbird and common skamelar, / Wanfukkit funling that Natour maid ane yrle" (Rough translation: "diseased vulture and common parasite, / weakly conceived foundling that Nature made a dwarf"). *Id.* From antient flyting to modern rap, "this kind of organized obscenity has evolved over and over in society—it must represent a fairly universal human urge." *Id.* at 248. To the extent this urge has found an outlet in playful insults, profanity is crucial in civilized society, as "an important safety valve, allowing people to express negative emotions without resorting to physical violence." *Id.* at 255.

Official attempts to discourage profanity ignore the role such words play in our lives. Profanity is a means to express and define ourselves, to cope, to joke, and to mock. Profanity is an integral part of the human condition. Indeed, a language stripped of profanity isn't a recognizable language at all. "[D]espite the variation across time and space, it's safe to say that most languages, probably all, have emotionally laden words that may not be used in polite conversation." Pinker, *supra*, at 330.[8] The choice to use those words, in good company or otherwise, isn't the government's to make.

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[8] "Perhaps the most extreme example is Djirbal, an Aboriginal language of Australia, in which *every* word is taboo when spoken in the presence of mothers-in-law and certain cousins. Speakers have to use an entirely different vocabulary (though the same grammar) when those relatives are around." Pinker, *supra*, at 330. And you thought your Thanksgiving dinner was tense.

II. THE GOVERNMENT CANNOT OBJECTIVELY DETERMINE WHAT LANGUAGE IS "SCANDALOUS"

When the government creates a scheme approving of some speech and disapproving of other speech, it must at the very least "articulate some sensible basis for distinguishing what may come in from what must stay out." *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1888 (2018). A standard runs afoul of the First Amendment if it "introduces confusing line-drawing problems," because such a standard creates "the potential for erratic application." *Id.* at 1889–90. So when government employees apply a speech code, their "discretion must be guided by objective, workable standards." *Id.* at 1891. The PTO's "scandalous marks" provision does not come close to meeting this requirement.

A. There Can Be No Single Standard for Offensiveness in a Pluralistic Society

The test used by the PTO to determine whether a mark is immoral or scandalous is whether a "substantial composite of the general public" would find the mark "shocking to the sense of truth, decency, or propriety; disgraceful; offensive; disreputable; . . . giving offense to the conscience or moral feelings; . . . or calling out for condemnation." Pet. App. 29a–30a.

Putting aside the vagueness of the term "substantial composite," (which, we are told, is "not *necessarily* a majority," *see* Pet. App. 66a n.11 (emphasis added)), how does the government expect to know public tastes at all? Remarkably, it has apparently never actually asked us. Even the FCC, which deals with this problem more often than the PTO, has never taken a single

survey. "As far as anyone can tell, the FCC hasn't actually done the legwork to find out what people really think about words—what's profane, in the present culture, in the present time." Bergen, *supra*, at 10.

But a single survey would not solve the more fundamental problem, which is that there cannot be one consensus standard of "scandalous language" in a heterogeneous society. Just look at the nations that actually *have* attempted such surveys. In New Zealand, for example, the Broadcasting Standards Authority conducts a regular survey asking whether citizens would find certain words always acceptable on radio and television, never acceptable, or acceptable in only some contexts. The results show a wide range of opinions. In other words, no matter how a government chooses to categorize any given word, it will always go against the values of a significant portion of the population. For example, the most recent survey found that 15 percent of the population viewed the word "God" as never acceptable for broadcast television, while 15 percent—probably not the same 15 percent—found "fuck" to *always* be acceptable. *See* N.Z. Broad. Standards Auth., *Language That May Offend in Broadcasting*, June 2018, https://bit.ly/2CuLdY3. That same study found that offensive standards vary across ages. For example, while only 18 percent of those 25–34 found "Jesus Christ" to be unacceptable in a TV drama, 36 percent of those 65 and over still found it unacceptable. *Id.* And on several words, the society was as evenly divided as could be, with a virtual 50/50 split on the question whether "mother fucker," "chink," or "faggot," were sometimes acceptable. *Id.* This lack of consensus is not peculiar to New Zealand. A similar study in Great Britain likewise "shows rampant disagreement." Bergen, *supra*, at 13 (citing Andrea Millwood-Hargrave,

Delete Expletives?, Ofcom (Dec. 2000), https://bit.ly/2Fr3PZF).

As scholars have noted, "[t]his diversity of opinion prompts a host of second-order questions." Bergen, *supra*, at 12. For example, "suppose there's a word that a minority subgroup of the population finds profane, and say it's a term of abuse. . . . In such a case, which matters more, the opinions of the population in aggregate or those of people in the relevant subgroup? How do you decide?" *Id.* Suppose a similar split appeared in attitudes about a particular word based on class or education. What should be the standard for a government censor evaluating offensiveness? The standards of the middle class? Of the most educated? Once again, there is no answer in the statute. Nor is there any answer that could be fair to society as a whole.[9]

As an added wrinkle, "[a] trademark is scandalous or immoral in context of the relevant marketplace for the applicant's goods or services identified in the application." Megan M. Carpenter & Mary Garner, *NSFW: An Empirical Study of Scandalous Trademarks*, 33 Cardozo Arts & Ent. L.J. 321, 334 (2015) (citations omitted). If examiners took this aspect of the test literally, they would in some cases have to familiarize themselves with the norms of other nations. But attitudes toward profanity vary just as much *across*

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[9] Those who consider themselves of a more refined class will seize on any difference in vocabulary to differentiate themselves and label the alternative "vulgar." "In Britain . . . *toilet* is vulgar in the original sense of the term—it has class connotations, employed by people of the middle class on down. *Loo* is the word used by upper-class Brits. . . . [W]hen Prince William and Kate Middleton broke up briefly in 2007, the British press blamed it on Kate's mother's use of the word *toilet*." Mohr, *supra*, at 202.

nations as they do *within* them. In France, for example, the mainstream culture's attitude toward profanity is so relaxed that *Le Monde* can quote the Prime Minister referring to a situation as "foutu" (fucked) with no real scandal. *See* Bastien Bonnefous, *Manuel Valls Droit dans Ses Bottes Face à Sa Majorité*, Le Monde (Sep. 15, 2014), https://lemde.fr/2U1zCtQ.[10]

The answer to these dilemmas is that the government should get out of the business of defining what is offensive or scandalous. It is simply impossible to find one cultural "spectrum" or "ranking" of offensive words that everyone will agree on even within a single country. While religious oaths are popularly understood to have been supplanted by sexual and excretory language as the more offensive terms, there are many for whom the old order still reigns. One scholar interviewed a modern-day member of an evangelical group at Oxford University who explained "It's offensive to God, basically, to take His name in vain. . . . I find that kind of swearing more offensive, probably, than the 'F-word' or whatever." Mohr, *supra*, at 257.

"Profanity isn't fixed. It's variable, it's context-sensitive, and it's relative. It's the product of cultural attitudes toward specific words, attitudes that can differ radically from person to person and from culture to culture." Bergen, *supra*, at 221. When the government tries to create one standard for a whole country, such

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[10] In the U.S., perhaps uniquely, the offensiveness of a politician dropping an F-bomb depends on his or her political party. *Compare* Nick Carbone, *Our Ten Favorite Joe Biden Moments: The 'BFD'*, Time.com (Nov. 19, 2012), https://bit.ly/2HyqTt2, *with* Lloyd Grove, *John Boehner's F-Bomb at Harry Reid Plunges D.C. Incivility to New Low*, The Daily Beast (Jan. 3, 2013), https://bit.ly/2SBuKrn.

a project inevitably involves telling a significant portion of that country that their standards are wrong and out of step with the official orthodox standards of the U.S. government. There is no reason the government should involve itself in such a project.

B. The Lines Censors Draw Are Often Biased, Irrational, or Naïve

There is strong evidence that when censors have the power to make subjective decisions over what is "scandalous," biases in favor of majority groups and powerful groups naturally arise.

This problem is not limited to government. When Rhett Butler left Scarlett O'Hara with the line "frankly my dear, I don't give a damn," in the film *Gone with the Wind* (MGM 1939), the movie evaded a fine for the word "damn" only because of a recent change in the Screen Code that excepted profanity in direct quotations from literary works. Mohr, *supra*, at 232. But that same code, hypocritically, "did not forbid or discourage the use of racial epithets such as *nigger*." *Id.* The original film script included the repeated use of that slur, which was removed from the script only "when the film's African American actors refused to say the word and hundreds of letters poured in objecting to its use." *Id.* Speech codes can reveal standards that seem not just backwards, but morally offensive.

More recently, the documentary *This Film Is Not Yet Rated* (IFC Films 2006) undertook a survey of MPAA ratings and found that movies with scenes involving gay sex were much more likely to incur an "NC-17" rating than movies with comparable scenes of straight sex, and that scenes emphasizing female sexual pleasure were rated more harshly than scenes of

male pleasure. Whether intentional or not, vague standards such as "scandalous to the community" invite this type of biased treatment. They especially risk special punishment for the expression of minority groups that are seen as outside the norm.

Censors in all fields routinely distinguish based on whether a "scandalous" word is spelled out or partially "hidden" through missing or rearranged letters. Yet studies have shown that this distinction does nothing to actually affect the reader's experience.

> One clever study had people read sentences with either profane words (like *This custard tastes like shit*) or censored versions (like *This custard tastes like s#!t*). After reading the sentences, participants performed a memory task to see whether they remembered exactly what they had seen. They would see one of the two sentences, with *s#!t* or *shit*, and had to say if this was the exact sentence they saw before. When *shit* replaced *s#!t*, most people had no idea.

Bergen, *supra*, at 218.

Similar alterations have in the past done nothing but marred artistic works, such as when Norman Mailer was convinced by his publisher to use "fug" throughout the *The Naked and the Dead* (1948).[11] Yet the PTO has demonstrated adherence to this fallacy, approving the trademark of the clothing brand FCUK while denying the trademark for the brand at issue in

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[11] On one (possibly apocryphal) occasion, this supposedly prompted a socialite to approach Mailer at a party by saying "So you're the young man who can't spell fuck." Mohr, *supra*, at 228.

this case, Fuct. *See* Pet. App. 40a. Of course, any consumer who reads the word FCUK "realize[s] the misordering [of letters] only after *fuck* has registered." Wajnryb, *supra*, at 187. The PTO cannot seriously argue that the fig leaf of misordering makes any real change, yet decisions on which brands make the cut can seemingly turn on such meaningless differences.

Further, although censors may be trained to spot "obvious" profanity, they are often oblivious to double-entendre or codewords. "[W]hen Matt Stone and Trey Parker made their feature-length *South Park* film . . . the title was originally *South Park: All Hell Breaks Loose*, but the MPAA categorically rejected the word *Hell*, so the film was retitled with a plausibly more offensive double entendre: *South Park: Bigger, Longer and Uncut*." Bergen, *supra*, at 220.

Shakespeare himself took delight in wordplay by means of homophones, suggesting to his audience various naughty words without ever having to outright say them. *See, e.g.*, Twelfth Night act 2, scene 5 (Malvolio: "By my life this is my lady's hand. These be her very C's, her U's and [sounds like "N"] her T's and thus makes she her great P's."). Shakespeare's subtle spelling game slipped past the watchful Bowdler, who printed it unaltered. Bowdler, *supra*, at 73.

PTO examiners have in some cases shown similar naiveté when it comes to approving and denying marks, such as one examiner who considered "Cum Together" to be acceptable because it's merely a parody of the Beatles. See Carpenter & Garner, *supra*, at 351.

Conversely, in some cases, government censors have been *over*-eager to find a naughty word when a mark was likely intended to be innocuous. In initially

rejecting a wine brand called "White Ass," the PTO examiner overlooked the fact that the wine's logo "included ears and a tail on the 'A' in the mark." Carpenter & Garner, *supra*, at 353. Only after this was pointed out on appeal was the rejection reversed. *Id.* In looking fastidiously for vulgarity just to prove how much they dislike it, enterprising censors resemble the woman who once complimented the dictionary author Samuel Johnson for excluding vulgarities. Johnson allegedly replied to her "No, Madam, I hope I have not daubed my fingers. I find, however, that you have been looking for them." Sheidlower, *supra*, at xxix.

Finally, and most troubling of all, different examiners have reached different conclusions on marks containing the same word, demonstrating the utter lack of guidance in this area. *See, e.g.*, Carpenter & Garner, *supra*, at 354 (noting that the PTO granted a mark for "Bonerwear" but denied a mark for "Boner Bats"). *See also* Pet. App. 39a–40a (noting that the PTO had been similarly inconsistent in deciding whether to grant trademarks containing words like "fugly," "cocaine," "BS," "turd," and "MILF"); Carpenter & Garner, *supra*, at 357 (finding further inconsistency for marks containing "anal," "ass," "cock," "fag," "penis," "slut," and "whore"). Despite the inconsistent rulings by PTO examiners, their decisions to reject marks for being "scandalous" are rarely reversed. *See id.* at 345 (noting that the lack of success on appeal "may be . . . because the lack of clear legal standards for examiners makes it too difficult for applicants to overcome refusals.").

"In sum, the various ways we react to profanity by trying to limit it are grossly ineffectual. They generally don't decrease how much it's used, and even when they do, new words spring up in their place." Bergen, *supra*,

at 220. The ineffective and inconsistent application of the PTO's vague standards alone makes the "scandalous marks" provision unconstitutional.

CONCLUSION

It is precisely in the sterile environment of government agencies where profanity might seem the most offensive and worthless. After all, in swearing as in all else, context is everything. "What makes a dirty joke inappropriate or unfunny depends on the joke and the context (the office versus the local pub). . . . [O]ffensiveness and humor depend on cultural contexts." Jay, *Why We Curse* 19. But it is exactly this context-dependency that can make examiners and other officials lose sight of the fact that transgressive and risqué language has its necessary place.

The government's attempt to define and punish scandalousness is both misguided and unconstitutional, so the Court should affirm the Federal Circuit.

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